IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL.,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

SUPPLEMENTAL BRIEF FOR APPELLANT

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CITATIONS

Cases:

Federal Statutes:

Miscellaneous:

NO. 14327

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This brief is filed pursuant to this Court's order, dated December 11 and filed December 14, 1955, inviting the parties to supplement their briefs, now on file, covering questions as to (1) the effect of the 1949 amendments to Section 3(j) of the Fair Labor Standards Act and on the principle of coverage announced by this Court in Consolidated Timber Co. v. Womack, 132 F.2d 101; (2) the proper construction of the statute defining retail establishment; (3) whether the case should be remanded to the district court for findings as suggested by Judge Fee in his dissenting opinion.

Further study and analysis of these three questions strengthens the conclusion that the majority opinion is correct in all respects and should be affirmed.

I

THE LEGISLATIVE REPORTS ON THE 1949 AMENDMENTS TO THE ACT SHOW CONCLUSIVELY THAT THE DECISION OF THIS COURT IN WOMACK, AND THE DECISIONS IN THE HANSON AND KIRSCHBAUM CASES WHICH GOVERN THE QUESTION OF COVERAGE HERE, ARE STILL CONTROLLING AND AUTHORITATIVE

The basis of this Court's majority opinion in the instant case is that it falls squarely within the principles of coverage pronounced in this Court's decision in Womack and in the Hanson and Kirschbaum cases. The conclusion of the trial court that the Anaconda mine is not so remote and isolated as will bring its messhall and lodging facilities within the coverage of the Act is in direct conflict with the Womack decision. The Womack case, as we will show, is indistinguishable from the instant case in actual fact and basic principle. This is revealed by undisputed facts, which were largely stipulated, as follows:

There are no eating and lodging facilities at the Anaconda mine other than those operated by appellees who hold an exclusive franchise to conduct subsistence operations (Plf. Exh. B, R. 41). While the Anaconda Company also owns some houses and trailers which it rents to employees, these are largely occupied by its mill workers who are usually family men and whose employment, unlike that of the underground miners, is of a more stable nature (R. 140). Of the some

236 persons employed by Anaconda at this mine, 126 are underground workers. And while the trial court stressed the fact that only 20% of all employees availed themselves of the facilities, what is important is that 62 of the underground workers, i.e. 50% of them, reside in the bunkhouse (Fdg. 3, R. 55, 56, R. 140). The underground workers, of course, constitute the nub of the mining operations. Since these workers are as a rule, transients and migratory workers (R. 140), the bunkhouse, which is limited to the male employees of Anaconda who are either single or whose families reside outside the area (Fdg. 5, R. 58), is peculiarly adapted to their needs. Apparent, also, is the fact that the operations of the messhall are equally closely integrated and adjusted to the mining operations. Thus, mealtimes are adjusted principally to meet the needs of the underground workers (R. 57). Employees working in the mine, who cannot as a practical matter leave the working area, eat their lunches at their place of work (R. 64). Approximately 20 to 25 percent of the total meals served by appellees consist of box lunches for these workers (Plf. Exh. C, R. 49). About 49 workers (primarily the underground workers who live in the bunkhouse) regularly avail themselves of the messhall facilities (R. 18). Most of the meals served are to these "Boardroll" workers (Plf. Exh. C, R. 49) at a price lower than that charged to employees for occasional meals (R. 64).

That the facilities are operated simply as an integrated part of the mining operations is further attested to by the fact that they are not open to the general public. As noted above, the bunkhouse

agreement" under which appellees operate the facilities expressly prohibits the use of the premises for any purpose other than that specified in the agreement (R. 41). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57). Indeed, a sign on one of the access roads warns, "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86). The only advertising of the facilities is Anaconda's help-wanted advertisement in which it makes a point of noting that "good bunkhouse accommodations" are available (Plf. Exh. AA, R. 51), which admittedly are an inducement in securing employees (R. 128, 129). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). These consist of occasional visitors for which a flat price per meal is charged (R. 42). Guests of the mine management are occasionally accommodated at the messhall, and Anaconda compensates appellees therefor (R. 19).

As the majority opinion noted, the Anaconda mine is located about a mile from the town of Darwin, less than 150 population, which lies in the Mojave desert (Opinion, p. 1). The undisputed facts show that there are no living facilities in the vicinity which could possibly meet the needs of the miners. Darwin has no privately operated rooming houses. The town has a small cafe which is little more than a lunch counter for short orders, containing 7 or 8 stools, and which obviously can accommodate only a handful of persons at a

on week days before 12:00 noon, and is closed one weekday altogether (R. 21). Its operations are now limited to serving ham sandwiches and chili when the refreshment bar is open (R. 147). Crosson's, the only other "restaurant" in the town of Darwin, sells only hamburgers, chili and beans, ham sandwiches and similar items as well as beer and soft drinks (R. 59, 60). Its accommodations are even more meager than those of the Darwin Cafe (Exhs. J and K).

The nearest other eating facilities are located in the towns of Keeler (R. 62), population 150, Panamint Springs (R. 62), population 10 to 12, Olancha (R. 61), population 200, and Lone Pine (R. 62, 63), located at distances of 23, 23, 34 and 38 miles away respectively. As noted by the majority, there are only meager accommodations at each of these places (Opinion, p. 2). The Desert Club, the only eating establishment in Keeler serves short orders and meals upon a very limited basis (R. 23). Panamint Springs has a restaurant and motel which can accommodate only 30 persons, and obviously these are tourist accommodations unsuitable for the needs of the miners. The per day rate at the motel is $4.00 single and $5.50 double. Prices for meals are: Breakfast $1.75, lunch $1.00, and dinner $2.00 (R. 24). The town of Olancha, 34 miles distant, contains restaurants and motels, but the living facilities are plainly not the type suitable for the mining employees (R. 22, 23). The nearest town which could possibly approximate the needs of the Anaconda employees is Lone Pine, some 38 miles from the mine (R. 62, 63).

The remoteness of the mine becomes more evident when it is considered that there is no public or carrier transportation service to any of the above towns. They are thus accessible only by private automobile (Fdg. 6, R. 58). While the trial court relied on the fact that a few mining employees lived in the towns, there is no indication just what their occupations are or what shifts they work. Plainly, the towns are not adapted to take care of any substantial number of the miners, and particularly not those on the early shifts. Obviously, the miners could not get breakfast or lunch at any of these places. They certainly could not drive 23 miles each morning for breakfast, a most important meal, we may safely assume, for miners, and many of them must eat their lunches underground for which they rely on the box lunches served by Anderson.

In actual fact, therefore, this case is plainly indistinguishable from the Womack case. The Anaconda mine here is just as remote and isolated as was the logging camp there. Indeed, as the majority opinion correctly notes, one of the cook houses involved in Womack was "in a village providing more public eating facilities than Darwin provided in our case" (Opinion, p. 4). There, also as here, employees were not required to use the facilities, and in fact many of the employees lived in Glenwood and ate their meals at home, as in this case. This Court, however, held that the availability of other limited facilities was "not persuasive" since "no such establishment could supply the necessary meals required by [such a large number of] hungry laborers" (132 F.2d at 107).

case was predicated on the assumption that the living facilities must be indispensable under possible as well as actual conditions in order for the Act to apply. After citing instances where employees have lived 30 or 40 miles from their place of work, it theorized that if appellees abandoned the facilities, restaurants in Darwin would expand their facilities to meet the increased demand (Fdg. 20, R. 69; R. 164). In Womack, too, the contention was advanced that the Company might have avoided the necessity of providing a cook house by employing loggers in the vicinity. There, too, the trial court had found "While this lunch counter could not under present conditions take care of all the trade were the cookhouse closed, * * * the possibility of expansion is a circumstance of weight" (43 F.Supp. at 631). Said this Court, in reversing, "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest" (132 F.2d at 107). Similarly, in Hanson v. Lagerstrom, 133 F.2d 120, the Eighth Circuit in holding the Act applicable to a cook house employee at a logging camp located only 13 miles from the towns of Little Falls and Big Falls, Minnesota, whose eating and lodging facilities might have been adequate for the needs of loggers, noted (at p. 122):

> The proximity of hotels at Little Falls and Big Falls, Minnesota, the presence of a highway running past the camp within 150 feet, and other roads kept open the year around, with many men owning cars of their own, are cited as indicating the non-essential character of the cook house. It is also said that the cost of production is the same whether the camp method is used or farmers and shackers are hired. But these suggestions are aside from the question. The fact that defendant might have employed other methods, thus avoiding

> the necessity of maintaining a cook house, is not important. We are here confronted with a condition and not a theory." We must confine our consideration to what was actually done and not to what might have been done.

Thus, the theorizing by appellees' expert as to what might be done in mining camps is immaterial (R. 114-126). Indeed this testimony boils down to little more than that living facilities are furnished as long as they are essential, and that they are abandoned only when they become non-essential. It follows that as long as facilities are actually furnished, it may be safely assumed that they are essential to the maintenance of a mine's production. As the Supreme Court so aptly noted in Armour & Co. v. Wantock, 323 U.S. 126 at 130: "A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or extravagance."

The basis for holding coverage of the cookhouse employees in both the Womack and Hanson cases was that such employment plainly falls within the criteria established by the Supreme Court in Kirschbaum Co. v. Walling, 316 U.S. 517. In that case, the Act was held applicable to maintenance workers employed by the owner of a loft building tenanted by manufacturers producing goods for commerce. The Supreme Court stated, in language which is quoted in both Womack and in the majority opinion in the instant case:

> * * * In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce." (316 U.S. 525-526, emphasis added).

trolling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments to the Act. And court decisions since the amendments recognize and confirm their continued authoritative effect. The legislative history of the amended Section 3(j) plainly shows that the change was not designed to cause any severe restriction of the scope of the Act as previously construed by the courts, but, rather to provide a more specific guide than does the word "necessary" to prevent extension of the Act "to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce." (Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949). As stated by Representative Lesinski, Chairman of the House Committee, "the amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past." (95 Cong. Red. 14,942, October 18, 1949).

Specifically, the change in the definition of "produced" was not intended to exclude from the Act employees of the type here involved and in the Womack and Hanson cases. This is made clear (1) by rejection of the word "indispensable" as being too restrictive,[1/] (2) by express

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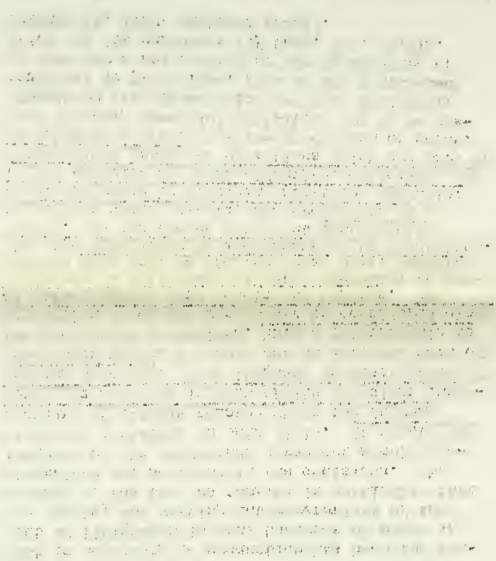
1/ 95 Cong. Rec. 14,874, October 18, 1949. See also 95 Cong. Rec. 14,936, October 18, 1949.

of the Senate Conferees, (3) by the choice of language virtually identical to the Supreme Court's language in Kirschbaum, and (4) by statements in both branches of Congress expressly approving the Kirschbaum case.

The Report of the Majority of the Senate Conferees makes it clear that employees of the type here involved were not intended to be removed from the protection of the Act. It states:

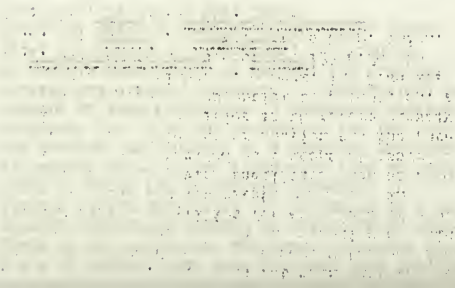
> What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities directly essential to production does not, as did the House Bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings [95 Cong. Rec. 14,874, October 18, 1949, emphasis added].

After pointing out that coverage of a real estate firm's employees could not be predicated on the rental of living quarters to factory



> * * * Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in Consolidated Timber v. Womack, 132 F.2d 101 (C.A. 9); Hanson v. Lagerstrom, 133 F.2d 180 (C.A. 8); Basik v. General Motors Corp. (Mich. Sup. Ct.), 19 N.W.2d 142. Ibid.

The majority opinion has thus correctly interpreted the intent of Congress in amending Section 3(j) as expressed in this Report. In effect the opinion holds that the living facilities need not be indispensable to productive operations at the mine in order for the employees operating them to be covered. Viewing the evidence in a practical manner it recognized that it permits of no other conclusion but that the facilities are provided as an "integrated part of the Anaconda enterprise" which are "essential to its business" (Opinion, p. 6). The Supreme Court has specifically approved of this approach in interpreting the tests of coverage set forth in this Act. Thus, in Armour Co. v. Wantock, 323 U.S. 126, it stated: "A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act [as in Kirschbaum] cannot be read as an authority that all which cannot be so described are out of it" (323 U.S. at 131). "'Whatever terminology is used, the criterion is necessarily one of degree and must be so defined.' Kirschbaum Co. v. Walling, 316 U.S. 517, 526. In their context, the restrictive words like 'indispensable,'



which petitioner quotes, do not have the automatic significance petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods" (323 U.S. at 130).

While the Armour case was decided prior to the 1949 amendments, the logic of the views there expressed by the Court is no less applicable to the amended language of Section 3(j). For in amending that Section, Congress expressly rejected the test of "indispensability," and specifically noted that the activities contemplated as coming within the amended language were those "which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods." (95 Cong. Rec. 14874, October 18, 1949, emphasis added). Moreover, express approval was given to the Armour decision in the Report of the Majority of the Senate Conferees (95 Cong. Rec. 14875).

Appellees, in an attempt to avoid the impact of the language of the Report which gives express approval to the Womack and Hanson decisions by citing them, quotes from the House Conference Report (Petition for Rehearing, p. 22). This Report does not mention the Womack and Hanson cases, but states:

> * * * Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F.Supp. 403 (N.D. Ohio, 1948)). Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a

during manufacturing, etc. activity * * *" (95 Cong. Rec. 14928, October 18, 1949, emphasis added).

A close comparison of the language of these two reports, and an appreciation of the Congressional intent to provide a clearer guide for judicial determination, plainly reveal the line of distinction to be drawn in this area of industrial feeding. The House Report was concerned with the typical situation where a restaurant is located in a factory, which is substantially indistinguishable from any neighboring restaurant to which factory workers would have access. The Senate Report, on the other hand, specifically contemplated the situation presented here to this Court, "where living facilities such as food and lodging are provided as a means of assuring continued and efficient production" (95 Cong. Rec. 14874, October 18, 1949).

Prior to 1945 the living facilities here were operated by the Anaconda Company itself (Fdg. 2, R. 54). Appellees now operate them under a "subsistence agreement" with Anaconda which significantly refers to them throughout as the "Operator" (R. 32, 38). At least 10 items in this agreement demonstrate that the facilities are not operated as an independent enterprise but, rather, solely for the benefit of Anaconda's mining operations. Thus, (1) The bunkhouse and messhall, which are owned by Anaconda, are "leased" to the "Operator" for "conducting subsistence operations." This so-called "lease" not only provides for no payment of rent, but specifically states that the consideration for the lease shall be the services rendered by the "Operator" (R. 35, 41). Housing is furnished by Anaconda without cost to all of

30 days written notice. (3) Anaconda furnishes not only the premises, but light, power, heat, fuel, gas, steam, telephone service, and even garbage and refuse disposal service "without cost to Operator" (R. 33). (4) No initial investment is required to be made by "Operator" since Anaconda furnishes bunkhouse, messhall, kitchen, and office equipment including such items as blankets, bedding, refuse cans, china and other similar equipment. "Operator" is under obligation only to replace expendable items when necessary, and, on termination of the agreement, to turn back all equipment, or its equivalent, less wear and tear (R. 34, 40). (5) "Operator" is reimbursed monthly for all operating expenses and is guaranteed a gross profit of $750.00 per month (R. 44, 46, 47). The cost to Anaconda has averaged $ .30 per meal (R. 64). (6) Detailed accounting records are required to be kept by the "Operator" which are subject to inspection, audit and review by Anaconda (R. 44), and a monthly operating statement is furnished to Anaconda along with an invoice for monies due the "Operator" to be paid within 15 days of its submission (R. 44). (7) The "Operator" is required to use the premises "exclusively" for Anaconda's employees and occasional authorized guests and visitors (R. 35, 36). Anaconda reserves the right of inspection and entry on the premises (R. 41). The messhall is to be operated principally for bunkhouse occupants and the agreement stipulates the prices to be charged (R. 42). Employees pay $2.60 per day on a straight board basis and $ .60 per day for lodging. This is collected by means of a payroll deduction plan (R. 42).

"Operator" is prohibited from assigning the agreement, subletting the premises, or granting any concessions without the prior written consent of Anaconda. (9) "Operator" agrees to furnish wholesome daily meals "as directed by the Company," the quality, quantity, and variety of which "shall be such as meets the Company's approval." (10) "Operator" is to secure insurance in the amount and form as the Company shall approve with Anaconda named as an additional insured party (R. 45).

The degree of control retained by Anaconda over the operation of the facilities is reflected in the fact that employee grievances or dissatisfaction as to the food served or prices charged are taken up directly with Anaconda, even as to such details as to whether the bacon is sufficiently well done (R. 98, 99).

As the majority opinion recognizes, "Realistically, appellees are managing the facility for Anaconda, and as a facility directly essential for Anaconda's enterprise" (Opinion, p. 7). Clearly, this is not the "independently owned and operated restaurant located in a factory" referred to in the House Conference Report as no longer being covered under the Act (95 Cong. Rec. 14928, October 18, 1949). The facts in the Factory Stores case cited in that Report (81 F.Supp. 403), in striking contrast to those in the instant case, show the independence of operation of the cafeteria plant facilities there which were located in the City of Cleveland, Ohio. There the arrangement called for the normal risks of an entrepreneur with payment of rental and no guarantee of profits. Indeed, Factory Stores was permitted to close certain of its units because of unprofitable operating conditions. The building

of one of the mills was even erected by Factory Stores, and all of the equipment of the cafeterias and canteens was owned by it. The record in the case reveals that Factory Stores determined its own prices (Factory Stores record, p. 408) which were comparable to and competitive with those for like articles sold at restaurants and retail stores in the neighborhood (Factory Stores record, p. 404-405).

Clearly, these factual differences in the two cases show the line of demarcation to be drawn, and lead logically to the conclusion that Congress did not intend to withdraw the protection of the Act from employees of facilities such as those in the instant case. Here they are provided "as a means of assuring continued and efficient production" within the intent of the Senate Conference Report (95 Cong. Rec. 14874, October 18, 1949), as distinguished from those contemplated by the House Report which are independently owned and operated as a restaurant, but which merely happen to be located in a factory.

Plainly, too, the fact that technically an independent contractor may be the agency through which the services are provided is not controlling. The House Managers' Report expressly stated that employees such as those held covered in Kirschbaum, "will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce" (95 Cong. Rec. 14929, October 18, 1949, emphasis added). And the Report of the Majority of the Senate Conferees, after giving specific approval to the Womack and Hanson decisions, and after enumerating several other categories of employees who remain within the coverage of the Act, stated:

directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14874-5, October 18, 1949, emphasis added).

Numerous decisions of the various courts of appeals and of the Supreme Court, rendered subsequent to the 1949 amendment to Section 3(j), have upheld under the amended section coverage of employees engaged in activities no more closely related or essential to production of goods for commerce than the messhall and bunkhouse employees here. Thus, in Mitchell v. Joyce Agency, 348 U.S. 945, the Supreme Court, citing the Kirschbaum decision, affirmed per curiam Durkin v. Joyce Agency, 110 F.Supp. 918 (N.D.Ill.), holding that guards furnished by an independent watchman agency to a producer of goods for commerce are "closely related" and "directly essential" to production of goods for commerce. Although the employer argued that the amended Section 3(j) excluded coverage of such employees (brief for Joyce Agency, Inc., p. 20), the Supreme Court summarily rejected this argument. Its brief per curiam decision cited as authority the Kirschbaum decision, thus plainly recognizing that the principles of coverage there set forth remained unaffected by the amendments.

In its most recent decision on coverage under the Act, Mitchell v. C. W. Vollmer & Co., 349 U.S. 427 (decided June 6, 1955), the Supreme Court similarly recognized that no drastic change was intended by the 1949 amendments. There too, the employer relied on the amendment to Section 3(j) as precluding coverage, arguing, as

in such interpretative decisions, had extended the coverage of the Act far beyond its intended scope, Congress amended the law * * *" (See brief for respondent p. 21). The Court made short shrift of this argument, emphasizing that this Act is "one that has been given a liberal construction from Kirschbaum Co. v. Walling, 316 U.S. 517, to Alstate Construction Co. v. Durkin, 345 U.S. 13" (349 U.S. at 429). And in the Alstate case, referred to by the Court in the above quoted language from the Vollmer decision, the employer also relied heavily on the argument that the amendments to Section 3(j) indicated "an intent to restrict" coverage under the Act (brief for petitioner pp. 21, 22). The Supreme Court, nevertheless, held, as had the Eighth Circuit in Tobin v. Johnson, 198 F.2d 130, certiorari denied 345 U.S. 915 (also decided subsequent to the amendments of the Act), that the preparation of road materials to be used in repairing highways is production of goods for commerce whether the materials were produced by the road construction company or by an independent producer of the materials (345 U.S. 13).

This Court, in General Electric Co. v. Porter, 208 F.2d 805, has also recognized that the amendment to Section 3(j) did not destroy the principles of coverage set forth in Kirschbaum. In holding the Act, as amended applicable to employees rendering fire protection services, it stated:

> * * * In Borden Company v. Borella, 1945, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, the Supreme Court not only reaffirmed its position in the Kirschbaum case but extended it (id. at 810).

> * * * While Borden Company v. Borella, 1945, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, was decided prior to the 1949 amendments to the Act, the logic of that opinion still applies to the instant case. The legislative history, interpretations of the Administrator of the Wage and Hour Division, and court decisions convince us that the employees such as here involved were not removed from the coverage of the Act by the amendments. Tobin v. Union Nat. Bank of Little Rock, D. C. Ark. 1953, 112 F.Supp. 702; 15 Federal Register 2925, Section 776.17, 776.18; Statement of the Managers on the Part of the House, H. R. Report No. 1453, 81st Congress, 1st Session, Oct. 17, 1949 (id. at 811).

See also Russell Co. v. McComb, 187 F.2d 524 (C.A. 5) (holding the Act, as amended, applicable to a watchman guarding a building in which some production of goods for commerce was carried on); Union National Bank of Little Rock v. Durkin, 207 F.2d 848 (C.A. 8) (holding that maintenance employees in a bank building occupied primarily by the bank and some insurance companies were engaged in a "closely related process or occupation directly essential to the production" of goods for commerce by the bank and the insurance companies, within the meaning of the amended definition (id. at 851)); Mitchell v. Famous Realty, 211 F.2d 198 (C.A. 2), certiorari denied, 348 U.S. 823 (holding watchmen employed to look for fires in buildings leased to independent producers of goods for commerce to be within the coverage of the Act, as amended); Casa Baldrich, Inc. v. Mitchell, 214 F.2d 703 at 707 (C.A. 1) (holding employees engaged in the printing of payroll forms, production records and other office forms used within the State by independent producers of goods for commerce to be within the coverage of the Act as engaged in occupations "not only 'directly essential' but also 'closely related' to such production"); Mitchell

v. Mercer Water Co., 208 F.2d 900 (C.A. 3), affirming per curiam Durkin v. Mercer Water Co., 112 F.Supp. 656 (W.D.Pa.) (holding bookkeepers of public utility companies supplying water and gas to industrial users who produced goods for commerce to be within the coverage of the Act, as amended); Mitchell v. Pascal System, 226 F.2d 391, 393 (C.A. 7) (holding employees of an automobile rental company repairing and maintaining automobiles leased to independent "industrial firms which use them in the production of goods for commerce" to be within the coverage of the Act, as amended).[2/]

As will be noted, many of these cases including Joyce Agency, supra, involved employees of an independent agency furnishing materials or services to producers of goods for commerce. Thus, that distinction is plainly immaterial, both under the amendment to Section 3(j) as well as prior thereto. As the Second Circuit, citing Kirschbaum, expressly stated in its recent decision in Mitchell v. Famous Realty, 211 F.2d 198 at 199:

> Nor can the Walton case be distinguished on the ground that the employer was engaged in the production of goods for commerce, while here, not the employer but the employer's tenants, are so engaged. It is the relationship of the service rendered by the employee in respect to the production of goods for commerce rather than the relationship of the business of the employer to that production which is of critical importance.

2/ To the same effect are the decisions in Messenger v. Traders Compress Co., 107 F.Supp. 354 (E.D.Okla.), reversed on other grounds, 199 F.2d 8 (C.A. 10), certiorari denied, 344 U.S. 909; Broach v. McPherson, 220 Ark. 457, 248 S.W.2d 355, 357 (S.Ct. Ark., 1952), reaffirmed 257 S.W.2d 565 (S.Ct. Ark., 1953); Tobin v. Promersberger, 104 F.Supp. 314 (D. Minn., 1952); Tobin v. Hayes, 11 WH Cases 140, 22 Labor Cases, par. 67,208 (S.D.Fla., 1952); Tobin v. Cherry River Boom & Lumber Co., 102 F.Supp. 763 (S.D.West Virginia, 1952).

And as the district court had expressly noted in Joyce Agency:

> * * * The legislative history of the amendment clearly indicates that there was no intention to overturn the existing law and exclude this class of employees from coverage by the Act. A careful examination also indicates that the amendment is expressed in the language of the Kirschbaum case. The traditional and prevailing view on this class of employees was adopted in the case of Russell Co., Inc. v. McComb, supra [187 F.2d 524] decided after the amendment [110 F.Supp. at 923].3/

In the only court of appeals decision interpreting the amended language of the Act in connection with industrial feeding, the Fourth Circuit held that even workers in a factory restaurant, if the conditions were analogous to those in an isolated mining or lumber camp such as in Womack, would be entitled to the benefits of the Act. Hawkins v. E. I. Du Pont de Nemours & Co., 192 F.2d 294.4/ And in Tobin v. Promersberger, 104 F.Supp. 314 (D.Minn., 1952), the court, in holding that occupations in logging camps of cooks, cookees, bull cooks, barn boss, watchman, and clerk, were closely related and directly essential to the production of goods for commerce, stated:

> Defendants cite legislative history to the effect that restaurant employees were not intended to be

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3/ The Seventh Circuit reversed the district court's decision in Joyce (211 F.2d 241), but as previously noted the Supreme Court, in a brief per curiam opinion handed down on February 28, 1955, reversed the judgment of the Seventh Circuit and affirmed in toto the judgment of the district court, citing the Kirschbaum decision (348 U.S. 945).

4/ On the subsequent appeal of that case, after remand, the court indicated that the question on the coverage issue was doubtful (E. I. Du Pont de Nemours & Co. v. Harrup, not as yet officially reported but printed in 12 WH Cases 693); but only because of the failure of evidence to prove the allegations of the complaint on the issue, and the court did not recede from its prior opinion. Indeed, the court cited with apparent approval the majority opinion in the instant case (12 WH Cases at 694).

> within Section 3(j) of the Act. But it is obvious that the legislators making the comments cited by defendants were speaking of the usual, common situations, not of those cases which, like the instant case, are not the usual prevalent variety. The legislative history aptly shows that the principle of Kirschbaum Co. v. Walling, supra, was not destroyed by the amendment (104 F.Supp. at 317).

Similarly, in Tobin v. Cherry River Boom and Lumber Co., 102 F.Supp. 763 (S.D.West Virginia, 1952), the court held that cook house employees were within the coverage of the Act, citing this Court's decision in Consolidated Timber Co. v. Womack, 132 F.2d 101; Hawkins v. E. I. Du Pont de Nemours and Co., 192 F.2d 294 (C.A. 4); and Hanson v. Lagerstrom, 133 F.2d 120 (C.A. 8) (102 F.Supp. at 768).

Appellees rely heavily on the recent decision of the Tenth Circuit in Juarez v. Kennecott Copper Corporation, 225 F.2d 100 (Petition, p. 24). But plainly, that case is inapposite to a determination of coverage here. It involved no more than the employees of a semi-public hospital, caring for patients consisting of the general public as well as members of the mining community. Indeed, approximately 80 percent of its operations was devoted to serving the general public and only 20 percent to the mining employees.[5/] In addition, the

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5/ The maintenance of the hospital in Juarez may thus be likened to the maintenance of the village, operated as "an ordinary town," where "some of the employees," but also their families and mostly "others," lived, in Maneja v. Waialua Agricultural Company, 349 U.S. 254 at 271. It is also comparable to the rental of houses by Anaconda to its family employees in the instant case, for which no coverage is asserted. The Administrator has never construed the amended Section 3(j) as covering the maintenance of that type of facility even though, in a broad sense, it may be considered necessary to production. The line of distinction is that in the one case the furnishing of facilities is directly essential and integrated with production whereas in the other case it is only indirectly so. This is the very distinction Congress drew in enacting the amendments.

undisputed facts showed that there were ample facilities in the area to care for the employees without the maintenance of the hospital. The chief surgeon and other doctors, while paid a salary by defendant, also engaged in independent practice. Clearly, the facilities were not provided "as a means of assuring continued and efficient production" as in the instant case and in Womack.

Appellees' continued reliance on McLeod v. Threlkeld, 319 U.S. 491 (Petition p. 19) is also, we submit, clearly misplaced. As the majority opinion correctly recognizes (Opinion p. 5) and indeed, as the Supreme Court explicitly stated in its opinion, that case was not concerned with the scope of "production of goods for commerce" phase of coverage under the Act, since McLeod's duties (cooking foods for a railroad maintenance of way crew) were "completely outside that clause" (319 U.S. at 493). Moreover, in its McLeod decision, the Supreme Court cited (319 U.S. at 493, 501) with apparent approval both this Court's decision in Womack and the Eighth Circuit's decision in Hanson. The inapplicability of McLeod to cases concerned with the "production of goods for commerce" phase of coverage such as is involved in the instant case is conclusively demonstrated by the Supreme Court's subsequent decision in Armour & Co. v. Wantock, 323 U.S. 126, where the Court expressly ruled that:

> McLeod v. Threlkeld, * * * which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce (323 U.S. at 131, emphasis added).

The Court similarly expressly rejected the applicability of the McLeod case to a determination of whether employees were engaged in the "production of goods for commerce" in Schulte Co. v. Gangi, 328 U.S. 108 at 119. And, although relied on heavily by the employers in both Joyce (brief pp. 16, 18, 24) and Alstate (brief p. 26), discussed supra, pp. 17, 18, 21, the Supreme Court, of course, did not consider that decision applicable to those cases. Indeed, the Supreme Court has never applied the ruling in McLeod to any case involving the "production of goods for commerce" phase of coverage. Nor have they even extended it to other situations involving "in commerce" coverage. See the Vollmer case, discussed supra p. 17 where, despite the fact that it was heavily relied on by the employer (Vollmer's brief pp. 5, 6 and 9), the ruling in McLeod was not applied.

II

THE SECTIONS 13(a)(1) AND 13(a)(2) EXEMPTIONS ARE CLEARLY INAPPLICABLE SINCE THE MESSHALL AND LODGING FACILITIES ARE OPERATED AS INTEGRAL PARTS OF ANACONDA'S PRODUCTION OPERATIONS

A. The Messhall And Lodging Facilities At The Mine Do Not Constitute A "Retail Or Service" Establishment Within The Meaning Of Section 13(a)(2).

Appellee is correct in its statement (Petition. pp. 8, 9) that in determining the applicability of the amended Section 13(a)(2) it is necessary to apply the tests specifically enumerated in that section. These are:

1. The establishment must be engaged in making sales of goods or services or of both.

2. Fifty percent of the establishment's annual dollar volume of sales of goods or services must be made within the State in which the establishment is located.

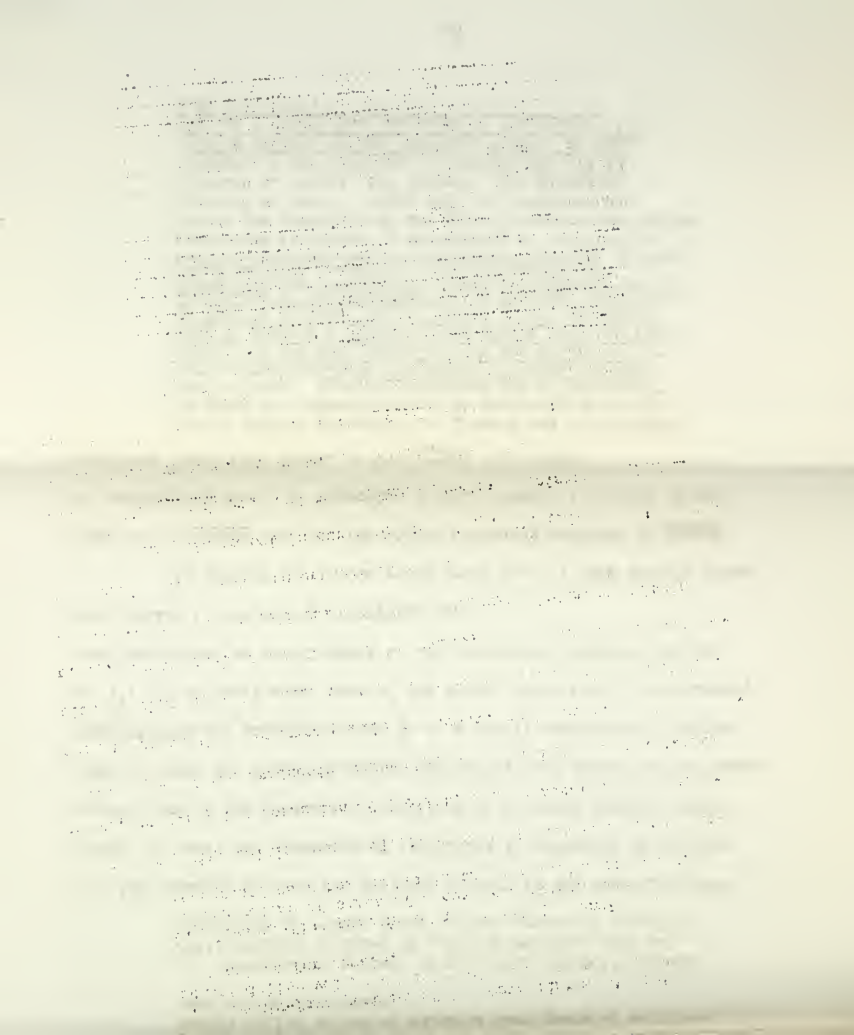
annual dollar volume of sales of such goods or services must not be for resale.

4. Seventy-five percent of the establishment's annual dollar volume of sales of goods or services must be recognized as retail sales in the particular industry.

But the majority opinion was entirely correct in its conclusion that where, as here, the operation of facilities is conducted as an integrated part of the productive operations of a mining company, rather than to serve the consuming public generally, such operation "is inconsistent with any conclusion that it is a retail enterprise" (Opinion, p. 7). As we shall show, none of the sales, under such circumstances, are "recognized as retail sales in the particular industry" within the meaning of the fourth enumerated test.

As pointed out in our reply brief (p. 8), this Court's decision in the Womack case and the Eighth Circuit's decision in Hanson are controlling here. In rejecting a claim identical to that of the appellees here, this Court, in the Womack case stated:

> In our opinion the exemption invoked was not intended to apply in a situation such as confronts us in the instant case. Here the cookhouse was a "necessary" part of the Company's production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. * * * Neither cookhouse was in competition with any private restaurant for there is no evidence of an effort to secure the patronage of the general public; the service was sold at cost to those whom the cookhouse was intended to serve: the loggers. The principal activity of the cookhouse definitely was not to furnish service to the consuming public, as such, but was to serve the employees of the company (132 F.2d 101, 107).



There can be no question but that the bunkhouse in the instant case is not a retail establishment. Its occupancy being limited to male employees of Anaconda (R. 58), it can in no sense be considered open to the public. Nor is the messhall in the instant case in any sense a "restaurant" meeting the "retail sales" requirements of the Act under Section 13(a)(2). Unlike cookhouses and messhalls, ordinary restaurants make "retail sales" of services to the general public and are not operated solely or primarily to facilitate the productive operations of a particular company. Restaurants are operated for profit, are located at readily accessible sites in a community, and through advertising and other means seek to attract the patronage of the public generally. Appellees' messhall, on the other hand, is operated primarily to provide food for Anaconda's miners; it is owned, subsidized, and closely controlled by the Anaconda Company (Fdg.16, R. 64-65) as an integral part of the main business of mining rather than as a separate profitable enterprise. Meal times are adjusted solely to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees in the mine whose duties make it impractical for them to leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches for these miners (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities

(Fdg. 5, R. 57).[6] As noted supra, p. 4, not only does the "subsistence agreement" under which appellees operate prohibit the use of the facilities for purposes other than that set forth in the agreement (R. 41), but a sign on one of the access roads to the Anaconda properties warns "unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86).

Appellees' assertion that since the messhall is available to the public "t a limited extent," it meets the retail establishment standards is plainly without merit. (br. p. 71). As the court below specifically found, only occasionally and incidentally are persons other than employees of Anaconda served at the messhall (Fdg. 1, R. 53). Under virtually identical circumstances, this Court in the Womack case rejected such a contention, holding that the fact that meals at the cookhouse were served to occasional persons who were not employees of the logging camp did not convert the cookhouse into a public restaurant or service establishment.[7] There the district court had held that the cookhouse located at the company's headquarters in Glenwood was exempt because it was frequented by a few members of the public. This Court, in reversing, pointed out that the distinction was not fundamental,

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6/ Only Anaconda "advertises" the facilities, and then the "advertising" is not for the purpose of attracting the public but for the purpose of attracting an adequate supply of labor for its mining operations (Plf. Exh. AA, R. 51).

7/ In the Womack case there were six persons who were not employed in the logging operations but who were employed in other businesses in Glenwood who regularly took their meals at the cookhouse. In addition an average of 10 meals a day were served to strangers--the general public [132 F.2d at 106]. In the instant case an average of only 168 meals per month or 5 3/5 meals per day were served to outsiders (Fdg. 5, R. 57). In addition, the lodging facilities here are limited exclusively to employees of the Anaconda Company (Fdg. 5, R. 58).

and that both cookhouses served the same "basic purpose and integration in the Company business" (132 F.2d at 107). And in Hanson v. Lagerstrom, 133 F.2d 120 (C.A. 8), the facts reveal that from 4 to 6 meals a day were served to the public. The Eighth Circuit, however, made short shrift of defendant's contention there that under these circumstances the cookhouse was a service or retail business. Said the court at pages 122-123:

> * * * In other words, the service to the public was incidental and so negligible and relatively unimportant that the exemption involved cannot apply.
>
> * * * * *
>
> * * * If, among his activities, defendant maintained a restaurant operated without reference to his industrial activity, it should then not be regarded as part of his business subject to the Act. The cookhouse was intended primarily for the benefit of defendant's logging employees and to increase his production operations. It is certainly not a typical retail establishment.

Appellees urge that the tests for determining the applicability of the exemption under the 1949 amendments are different from those applicable at the time of Womack (Petition, p. 10). But that the ruling of the Womack and Hanson cases is still controlling and authoritative with respect to the applicability of Section 13(a)(2) to cookhouses in isolated logging or mining camps, which are operated simply as adjuncts to the principal business of an employer, was made clear in the legislative reports on the 1949 amendments to the Act. Thus, Senator Holland, who sponsored the adopted amendment made the following remarks:

duced has been a product of several months work and discussion. It was placed in its present form some 2 months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:

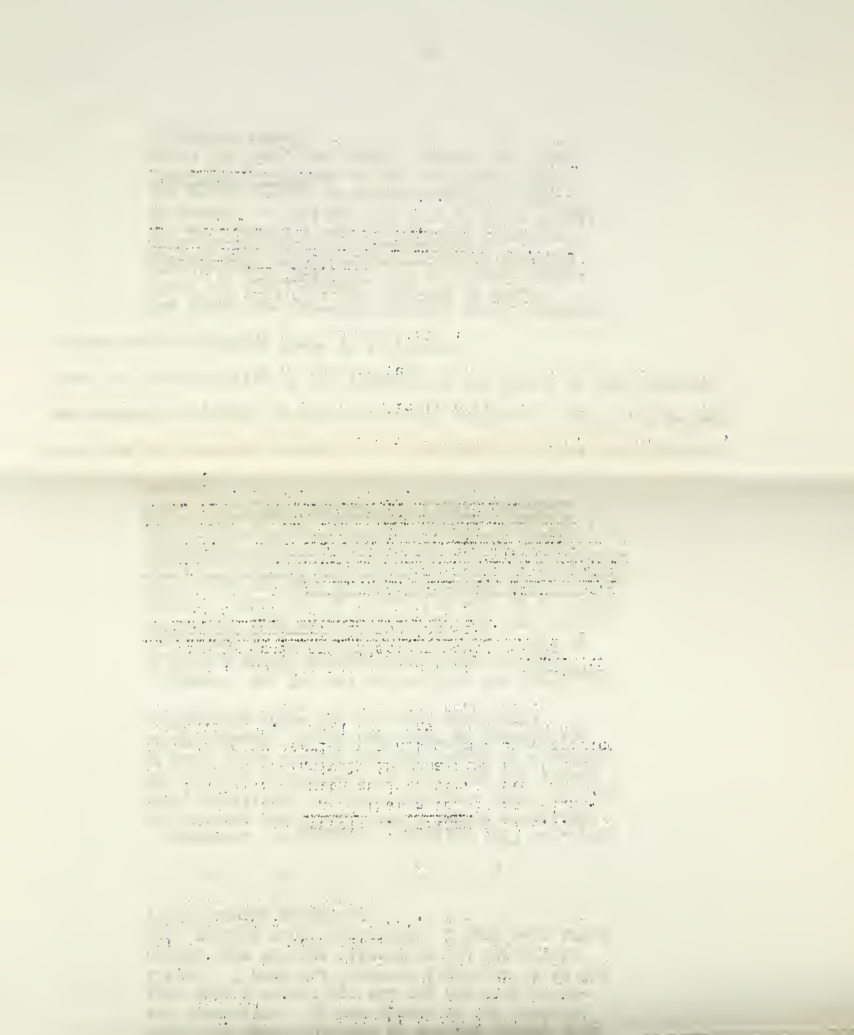
* * * * *

Question. In Boutell v. Walling (327 U.S. 463) the Supreme Court held that a repair establishment, affiliated with an interstate motor carrier and engaged exclusively in repairing the trucks of such motor carrier was not exempt as a service establishment. Would that case be decided any differently under the proposed amendment?

Answer: No; for the reason that the servicing of such a repair establishment would not be recognized as retail in the industry. This is so because such establishment is not open to the general public and is really the same as a repair department operated by the interstate motor carrier itself. A repair establishment affiliated with an interstate motor carrier is not like a garage patronized by auto and truck owners generally (95 Cong. Rec. 12505, August 30, 1949). [Emphasis added].

That this is a general principle, not restricted to this one situation, but applicable equally to other similarly affiliated facilities is made clear by the generality of the language in the Report of the Majority of the Senate Conferees where it is stated:

> The conference agreement exempts establishments which are traditionally regarded as retail. Establishments which are not ordinarily available to the general consuming public (such as the motor-carrier repair affiliate considered in Boutell v. Walling (327 U.S. 463) * * * will not become retail or service establishments under the provisions of the conference agreement" (95 Cong. Rec. 14877, October 18, 1949) [Emphasis added].



managers on the part of the House, in explaining the effect of the amendments after the conference agreement stated:

> The conference agreement does not change the status, insofar as the retail or service exemption is concerned, of establishments which are not ordinarily available to the general consuming public (95 Cong. Rec. 14942, October 18, 1949.

Moreover, Congress in drafting the amendments to this Act was well aware that restaurants were generally exempt as retail establishments under Section 13(a)(2). There thus would have been no occasion for all the legislative discussion regarding coverage under Section 3(j) of industrial feeding facilities, or for the careful distinction between lumber camp cookhouses and independently operated factory restaurants (see supra pp. 9-13), if all such feeding establishments were exempt as retail restaurants. Plainly employees engaged in cookhouses of the Womack and Hanson type were not regarded by Congress as working in exempt "restaurants" under Section 13(a)(2). Such facilities which are so integrated with production operations obviously have no independent personality as retail establishments.

Under these circumstances, appellees could introduce no evidence whatsoever to show that the sales of the bunkhouse were "recognized as retail sales in the particular industry." And the only evidence which appellees did, and could possibly, adduce purporting to bear on the recognition point consisted of the self-serving opinions of interested parties (see appellant's reply brief, pp. 18 and 19). As Judge Carter so aptly characterized this opinion evidence, it was tantamount to "getting a witness on the stand in a criminal case and

defendant negligent?' in a negligence case" (R. 143). In fact, in the instant case, it is the same as putting the defendants themselves on the stand and asking them such questions. But what is important is that there is plainly no occasion for taking any evidence at all on the question of what percentage of an establishment's sales are recognized as retail in the industry where, as here, facilities are operated simply as an integral part of production operations rather than to serve the general consuming public. The legislative history to the amendments, we submit, shows clearly that under such circumstances, as a matter of law, none of such sales are retail.

B. Appellees' Employees Engaged In The Operation Of The Messhall And Lodging Facilities For Employees At The Anaconda Mine Are Not Employed In A "Local Retailing Capacity" Within The Meaning Of Section 13(a)(1)

Appellees' assertion that this Court erred in failing to consider whether its employees were exempt under Section 13(a)(1) (Petition, p. 3) is completely without substance. As pointed out in appellant's reply brief (p. 19), such employees were not employed in a "local retailing capacity" under Section 13(a)(1) anymore than they were employed by a "retail or service establishment" under Section 13(a)(2).

Section 13(a)(1) provides an exemption for "any employee employed in a * * * local retailing capacity" as such term is defined and delimited by regulations of the Administrator. The Administrator's regulation (29 CFR, 1955 Supp., 541.4) defines an employee employed in a "local retailing capacity" as one--

(a) who customarily and regularly is engaged in --

(1) making retail sales of goods or services of which more than 50 percent of the dollar volume are made within the State where his place of employment is located, or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages and

(b) whose hours of work of a nature other than those described in paragraphs (a)(1) or (a)(2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.

Thus, under the Regulations an employee to qualify for exemption must be engaged either in making retail sales or in performing work incidental thereto. As we have pointed out in our argument on the Section 13(a)(2) issue, supra, p. 25, the messhall and lodging operations conducted by appellees at the Anaconda mine are wholly foreign to the concept of "retail" sales. Accordingly, none of these employees are engaged in making retail sales or in performing work incidental thereto.

The Supreme Cpurt has expressly recognized that the Sections 13(a)(1) and 13(a)(2) exemptions are merely complementary and were intended to exempt only employees engaged in traditionally "local retailing" capacities. Thus, it stated in Phillips Co. v. Walling, 324 U.S. 490 at 497:

> * * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store. * * *Section 13(a)(2) is a part of the Act only because of the fear that Section 13(a)(1) in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. Walling v. Jacksonville Paper Co., 317 U.S. 564, 571.

to retail sales or services to the general consuming public, and not to services which are an essential and integral part of the production or manufacturing process. This was only recently expressly held in Mitchell v. Pascal System, 226 F.2d 391, 394 (C.A. 7). As pointed out supra, the furnishing of the messhall and lodging facilities in the instant case is plainly not for the general consuming public. It is, on the contrary, simply an essential part of Anaconda's mining operation, i.e., a component of interstate production and not local retailing.

III

THE CASE SHOULD NOT BE REMANDED SINCE THE CONCLUSIONS EXPRESSED IN THE MAJORITY OPINION ARE ESSENTIALLY LEGAL CONCLUSIONS

The rulings in the majority opinion that appellees' employees are engaged in the "production of goods for commerce" and that the messhall and lodging facilities do not constitute a "retail establishment" since they are an "integrated part of the Anaconda enterprise," are essentially conclusions of law. They are not, we submit, factual findings which must be supplied by the trial court as suggested in the dissenting opinion. Indeed, even the court below considered the question of whether appellees' employees were engaged in the "production of goods for commerce" to be a conclusion of law (See Conclusions of Law, R. 73). While its conclusion that the employees were not covered obviated the necessity of rendering an opinion on the exemption issue, that also, as we have shown in Point II is essentially a conclusion of law. The essential relevant facts (as distinguished from mere self-serving opinion evidence) on both issues

the nature of appellees' operations, and the area of dispute concerns only the legal inferences to be drawn from such facts.

The courts have held specifically that what constitutes "interstate commerce" or "production of goods for commerce" under the Fair Labor Standards Act is essentially a legal question. Thus, in its recent decision in Mitchell v. Denton, 224 F.2d 596 at 598, the Fifth Circuit, in holding that the trial court erred in submitting the coverage question to the jury, stated "On the basis of these facts, the employees were engaged in the production of goods for commerce as a matter of settled law * * *." See also Clyde v. Broderick, 144 F.2d 348, 349 (C.A. 10); Nick v. United States, 122 F.2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687, rehearing denied 314 U.S. 715, rehearing denied 316 U.S. 710, reaffirmed on this point in Hulahan v. United States, 214 F.2d 441, 446 (C.A. 8), certiorari denied 348 U.S. 856; Kantor v. Garchell, 150 F.2d 47 (C.A. 8). Any decision on this question necessarily involves legal conclusions, moreover, that have been settled by decisions of the Supreme Court and the United States Courts of Appeals as well as interpretations of the legislative history of the Act and its amendments.

Similarly, the rulings in the majority opinion that the facilities are "an integrated part of the Anaconda enterprise" and thus not a "retail establishment" are simply ultimate inferences from undisputed evidence, largely stipulated. The Supreme Court, as well as this Court and other Courts of Appeals, have repeatedly thus viewed and dealt with questions concerning both coverage and the

applicability of the Section 13(a)(2) exemption under this Act. Thus in Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, in its most recent decision on coverage under the Fair Labor Standards Act (decided June 6, 1955), the Supreme Court reversed the holdings of both the Court of Appeals and the district court that employees performing work in the construction of an alternate route for an existing interstate instrumentality were not engaged "in commerce." And in Roland Co. v. Walling, 326 U.S. 657, although the trial court had held that employees of an establishment furnishing repair service for equipment used in the production of goods for commerce were not covered, and also that the establishment was exempt as a retail establishment under Section 13(a)(2), the Supreme Court affirmed the Fourth Circuit's reversal on both issues. The recent decision of the Seventh Circuit in Mitchell v. Pascal System, 226 F.2d 391, involved precisely the same issues that are here involved. There the Court of Appeals not only reversed the trial court on the coverage and Section 13(a)(2) questions, but also expressly held that Section 13(a)(1) was inapplicable although that question had not been considered by the district court (See district court decision in 12 WH Cases 143).

Directly in point is this Court's decision in Consolidated Timber Co. v. Womack, 132 F.2d 101, reversing the decision of the district court which had held one of the cookhouses there involved exempt as a retail establishment under Section 13(a)(2). As we have pointed out supra, pp. 2-6, that case is factually indistinguishable from the instant case. See also Mitchell v. Famous Realty, Inc., 211 F.2d 198 (C.A. 2), certiorari denied, 348 U.S. 823, where despite the

holding of the district court that the employees involved had "no close or immediate connection with the process of production for commerce," (111 F.Supp. 659) the Second Circuit reversed, holding them to be engaged in the production of goods for commerce within the coverage of the Act, as amended. Other decisions in which the courts have reversed on either questions of coverage or exemption under Section 13(a)(2), or both, are so numerous[8/] as to require no further comment. In all these cases the courts have plainly considered the decisions of the district judges as reviewable[9/] and the application of the statutory standards to facts largely undisputed as essentially questions of law.

Nor have the courts hesitated to review and reverse even so-called "findings" of district courts where they involve no more than, as here, the application of statutory definitions under the Act to substantially undisputed evidentiary facts. Thus, in Rutherford Food Corp. v. McComb, 331 U.S. 722, a case involving the question of

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8/ Mitchell v. Chambers Construction Company, 214 F.2d 515 (C.A. 10); Mitchell v. Brown, 224 F.2d 359 (C.A. 8), certiorari denied, 350 U.S. 875; McComb v. Wyandotte Furniture, 169 F.2d 766 (C.A. 8); Walling v. Friend, 156 F.2d 429 (C.A. 8); Bracey v. Luray, 138 F.2d 8 (C.A. 4), certiorari denied, 332 U.S. 790; Walling v. Goldblatt Bros., 128 F.2d 778 (C.A. 7), certiorari denied, 318 U.S. 757; Slover v. Wathen, 140 F.2d 258 (C.A. 4).

9/ Decisions of the trial courts upholding the validity of pay plans under the overtime requirements of Section 7(a) of the Act have also plainly been considered reviewable on appeal as involving largely a question of law. Walling v. Helmerich & Payne, 323 U.S. 37; Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, rehearing denied, 326 U.S. 804; Bay Ridge Co. v. Aaron, 334 U.S. 446; McComb v. Roig, 181 F.2d 726 (C.A. 1); McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265 (C.A. 10); Walling v. Uhlmann Grain Co., 151 F.2d 361 (C.A. 7).

fact which emphasized the independent aspects of meat boners in a slaughterhouse and concluded that these workers were not "employees" within the meaning of the Fair Labor Standards Act. (See detailed account of the findings in 156 F.2d at 517-519). Despite the trial court's "findings of fact," the Tenth Circuit reversed and its decision was affirmed by a unanimous Supreme Court. Similarly, in United States v. Silk, 331 U.S. 704, despite "the concurrence of the two lower courts" in "finding" the unloaders of coal cars to be independent contractors rather than "employees," the Supreme Court reversed on the ground that "These inferences were drawn by the courts from facts concerning which there is no real dispute." 331 U.S. at 716. This Court reached a similar result on the same question in Tobin v. La Duke, 190 F.2d 677 (C.A. 9) where, although the trial court had specifically found that certain workers were "independent contractors" and not "employees" under the Act, this Court reversed per curiam, stating:

> There is no material dispute on the basic facts of the arrangement and relationship between appellee and the four persons involved. They are summarized in a stipulation of the parties, further supplemented by uncontradicted evidence introduced on the trial. The conclusion to be drawn from the facts is essentially one of law.

And in considering a question of "hours worked" under the Act this Court in General Electric Co. v. Porter, 208 F.2d 805 at 814, certiorari denied, 347 U.S. 951, stated:

> The ultimate determination of whether or not sleeping time is work time presents a mixed question of law and fact. In reviewing such a mixed question we may substitute our judgment for that of the trial court.

The Supreme Court in a number of other decisions, and also numerous other decisions of this Court as well as of other courts of appeals, confirm the soundness of thus viewing and dealing with "findings" which are simply ultimate inferences from basically undisputed evidence or which are essentially conclusions of law.[10/] "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based," said the Supreme Court in Baumgartner v. United States, 322 U.S. 665, 670-671, "The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made" (ibid.).

We submit that there is no dispute as to the "basic facts of the arrangement" here, and that the majority's conclusions are simply legal inferences drawn from such facts. Since these legal

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10/ Baumgartner v. United States, 322 U.S. 665, 670; United States v. United States Gypsum Co., 333 U.S. 364, 394; Equitable Life Assur. Soc. v. Irelan, 123 F.2d 462, 464 (C.A. 9); Smith v. Royal Ins. Co., 125 F.2d 222, 224 (C.A. 9), certiorari denied, 316 U.S. 695; Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541 (C.A. 9); Stuart Oxygen Co. v. Josephian, 162 F.2d 857 (C.A. 9); see also Orvis v. Higgins, 180 F.2d 537, at 539 (C.A. 2), certiorari denied, 340 U.S. 810; Sun Insurance Office, Ltd. v. Be-Mac Transport Co., 132 F.2d 535, 536 (C.A. 8); Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 (C.A. 3); Knapp v. Imperial Oil & Gas Products Co., 130 F.2d 1, 3 (C.A. 4).

inferences are, we submit, clearly the only correct ones, no useful purpose would be served by remanding the case to the district court for further "findings."

CONCLUSION

The majority decision of the Court should be affirmed in all respects.

Respectfully submitted.

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